

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KERRY BENTIVOLIO, a/k/a OLD FASHION  
SANTA,

UNPUBLISHED  
October 24, 2000

Plaintiff-Appellant,

v

No. 214380  
Livingston Circuit Court  
LC No. 97-015752-AV

HANNAH McTAGGART,

Defendant-Appellee.

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Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

This defamation case arises out of plaintiff's claim that defendant slandered him, while he was performing his annual duties as Santa Claus, primarily by calling him a fraud, a cheat, and a criminal. A district court jury awarded plaintiff \$100,000 in economic and noneconomic damages. The circuit court reversed and remanded for a new trial. Plaintiff appeals by leave granted. We affirm.

In a defamation action, the elements of a plaintiff's prima facie case depend on the plaintiff's status as a private or public figure. If the plaintiff is a public figure, he must prove that the defendant published the defamatory falsehood "with knowledge that it was false or with reckless disregard of whether or not it was false." MCL 600.2911(6); MSA 27A.2911(6). If the plaintiff is a private individual, he must merely prove that the defendant negligently published the defamatory falsehood. MCL 600.2911(7); MSA 27A.2911(7). In this case, the district court ruled that plaintiff was a private individual for purposes of this suit, and not a public figure.<sup>1</sup>

The circuit court reversed and remanded the district court jury verdict, finding an abuse of discretion in the district court's failure to instruct the jury that plaintiff could recover noneconomic

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<sup>1</sup> Although the circuit court expressed disagreement with the district court on this issue, it did not reverse the district court's ruling that plaintiff was a private individual. Neither party raises that issue on appeal to this Court. Therefore, under the law of the case doctrine, plaintiff shall be considered as a private individual when this matter returns to the district court on remand.

damages only upon clear and convincing proof that defendant acted with actual malice. Plaintiff appeals the circuit court's decision on this issue. We review claims of instructional error for an abuse of discretion. *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48; 65; 597 NW2d 543 (1999); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).

In defamation actions involving a private individual, the plaintiff may recover only economic damages, upon proof that the defendant negligently published the defamatory falsehood. MCL 600.2911(7); MSA 27A.2911(7). However, because MCL 600.2911(2)(a); MSA 27A.2911(2)(a) provides that all plaintiffs in defamation actions are entitled to recover "the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings," this Court has held that private individuals may recover noneconomic damages only upon proof that the defendant acted with actual malice, i.e., that the defendant made the statement with the knowledge that it was false or with reckless disregard of the truth. *Glazier v Lamkin*, 201 Mich App 432, 437-438; 506 NW2d 570 (1993). In this case, the district court failed to instruct the jury that it could award plaintiff noneconomic damages only after determining as a factual matter that defendant acted with actual malice. Therefore, we agree with the circuit court's determination that the district court abused its discretion when instructing the jury.

Plaintiff concedes that the district court abused its discretion by failing to instruct the jury regarding actual malice. Nevertheless, plaintiff argues that the existence of actual malice is a question of law, rather than a question of fact, and argues that a new trial is unnecessary because the record contains sufficient evidence to support a finding that defendant acted with actual malice. In support of his argument, plaintiff relies on *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 685; 109 S Ct 2678; 105 L Ed 2d 562 (1989) and *Garvelink v The Detroit News*, 206 Mich App 604, 609; 522 NW2d 883 (1994). Both decisions held that whether the evidence in a defamation case is sufficient to support a jury's finding of actual malice is a question of law. *Harte-Hanks*, *supra*, 491 US 685, citing *Bose Corp v Consumers Union of United States, Inc*, 466 US 485, 80 L Ed 2d 502; 104 S Ct 1949 (1984); *Garvelink*, *supra*, 206 Mich App 608, citing *Harte-Hanks*, *supra*.

In *Harte-Hanks*, the United States Supreme Court held that appellate courts reviewing defamation cases "have a constitutional duty to 'exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.'" *Id.* at 659, quoting *Bose*, *supra*, at 514. Further, the Court held that appellate courts "have a duty to 'independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice.'" *Id.* at 686, quoting *Bose*, *supra*, at 511. However, the Court stressed that it would not consider what facts the jury "could have" or "may have" found, but would consider only what facts the jury *must* have accepted or rejected in order to reach its verdict for the plaintiff. *Id.* at 689-690, emphasis in original.

We believe that plaintiff's reliance on *Garvelink* and *Harte-Hanks* is misplaced. Defendant apparently confuses the jury's role as finder of fact and the appellate court's subsequent role of reviewing the record to determine whether sufficient evidence exists to support the jury's finding of fact. In this case, there has been no initial jury determination that defendant acted with actual malice. This Court will not substitute its own judgment regarding factual matters for the sound judgment of the trier of

fact. Upon receiving an opportunity to consider the issue, the jury may determine that defendant acted with actual malice. If that occurs and this case returns to this Court on appeal, this Court will then be able to review the trial court record to determine whether the evidence was sufficient to support the jury's determination.

Finally, we believe that the district court jury verdict must be reversed and the matter must be remanded for a new trial because the district court abused its discretion in failing to instruct the jury with regard to negligence, an element of a private individual's prima facie defamation claim. MCL 600.2911(7); MSA 27A.2911(7) provides:

An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

Because the trial court failed to instruct the jury that it could award plaintiff economic damages only if it found that defendant acted negligently in publishing the defamatory falsehood, the trial court abused its discretion. We therefore affirm the circuit court's decision reversing the district court jury verdict and remanding for a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Michael R. Smolenski